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Via Hand Delivery

Attention: Sharla Dillon, Docket Manager

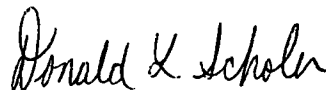
Re: Petition of On-Site Systems, Inc. To Amend Its Certificate of Convenience and
Necessity
Docket No. 03-00329

Petition of Tennessee Wastewater Systems, Inc. To Amend Its Certificate of
Convenience and Necessity
Docket No. 04-00045

Dear Chairman Miller

I have enclosed for filing the original and fourteen copies of the Reply Brief of Tennessee Wastewater Systems, Inc. in this consolidated matter. Please return the extra copy to me stamped filed. Thank you for your assistance in this matter.

Sincerely yours,



DONALD L. SCHOLLES

Enclosure

c. Charles Pickney, Jr.
Mark Jendrek
Charles B. Welch, Jr.
G. Scott Thomas

BKSJ File No. 04-189

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

IN RE:)	
)	
PETITION OF ON-SITE SYSTEMS, INC. TO AMEND ITS CERTIFICATE OF CONVENIENCE AND NECESSITY)	Docket No. 03-00329
)	
)	
and)	
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)	
PETITION OF TENNESSEE WASTEWATER SYSTEMS, INC. TO AMEND ITS CERTIFICATE OF CONVENIENCE AND NECESSITY)	Docket No. 04-00045
)	
)	

REPLY BRIEF OF TENNESSEE WASTEWATER SYSTEMS, INC.

Comes now Tennessee Wastewater Systems, Inc. (the Company) and files this Reply Brief in response to the Post-Hearing Briefs filed by the Intervenor in this consolidated case.

Proper Construction of "Utility Water Service" in T.C.A. § 6-51-301(a)(1)

Since the Company filed its Post-Hearing Brief in this case, the Tennessee Attorney General's office has issued Opinion No. 04-134 on the issue of whether a municipality's provision of sewer service comes within the meaning of "utility water service" under T.C.A. § 6-51-301(a)(1). The Tennessee Attorney General states, "Because Tennessee statutes generally list water and sewer service as separate services, a court is likely to conclude that the term "utility water service" as used in Tenn. Code Ann. § 6-51-301(a) does not include a sanitary sewer system." The rules of statutory construction fully support this opinion as outlined by the

Company in its Post-Hearing Brief. A copy of this opinion is attached to this Reply Brief as Exhibit 1.

In this opinion the Tennessee Attorney General goes further and suggests that T.C.A. § 7-51-401(c) *might* prohibit a city from extending sewer service outside of its boundaries into the certificated service area of a private utility. This suggestion is made based upon the Attorney General's assertion that the term "public utility agency" arguably "includes a utility company holding a certificate of authority from the Tennessee Regulatory Authority."

Whether T.C.A. § 7-51-401(c) limits the ability of the City of Pigeon Forge (the City) to extend sewer service into an area where the Company will actually be providing sewer service in the certificate area sought is not the issue the City was concerned about at the hearing in this matter. The City was concerned that the operation of T.C.A. § 6-51-301(a)(1) would preclude the City from extending sewer service into the Company's certificated service area even when the Company had not provided service to such area without annexing such territory. The Attorney General's Opinion confirms that T.C.A. § 6-51-301(a)(1) does not preclude the City from extending sewer service into any unserved area within the Company's certificated service. Mr. Pickney has testified the Company has no problem with the City extending sewer service into unserved territory within the Company's certificated service when no annexation has occurred. The Company seeks to provide sewer service where a municipality is unwilling or unable to provide sewer service.

Notwithstanding the City's concern actually expressed in the hearing, the Company asserts that T.C.A. § 7-51-401(c) does not apply to utilities certificated by the Authority. The legislature used the term "public utility agency" not public utility. The legislature has no

problem using the term public utility when it intends to refer to all entities which provide a public utility service. Each of the entities named in the sentence preceding the term "public utility agency" in T.C.A. § 7-51-401(c), "county, utility district, municipality," are political subdivisions of the State of Tennessee. These entities are not private corporations, companies or individuals. A review of subsections (a) and (b) further support the Company's position. Under subsection (a) counties, utility districts, municipalities and other public agencies are granted the power to extend water and sewer service beyond their boundaries. Under subsection (b) any such service outside of these entities' boundaries must be self-supporting. Public utilities under T.C.A. § 65-4-101 do not have defined geographic boundaries like the public agencies referred to in this statute. No statute requires that public utilities under T.C.A. § 65-4-101 charge different rates for utility service outside of the actual certificated service area of the public utility to make sure service outside of the actual certificated service area of the public utility is self-supporting. This Authority has no such requirement as well. Is the Authority's denial of a certificate to provide sewer service on the grounds that a municipality might someday want to serve the same area without annexing it in the public interest? The Company asserts it is not when no statute or case prohibits the municipality from extending sewer service into the unserved area of a certificated utility when the municipality does not annex such area.

Present and Future Public Convenience and Necessity Requires the Grant of the Petitions

In its Post-Hearing Brief the City mischaracterizes Mr. Pickney's testimony concerning the cost included in the Company's rate structure related to filing petitions for certificates with the Authority. The City infers that the \$.40 which the Company includes in its monthly rate during

its last rate case to cover miscellaneous costs is only designed to cover the Company's costs related to filing petitions for certificates with the Authority. Mr. Pickney's testimony is to the contrary. Mr. Pickney testified that the costs of filing petitions for certificates is only one of the costs covered by this \$.40 to cover miscellaneous costs. This miscellaneous cost category covers every expense the Company has not accounted for elsewhere in its rate structure. Transcript at 20.¹ Mr. Pickney gave the examples of legal expenses of the Company not related to the filing of petitions, expenses incurred to comply with regulations of the Tennessee Department of Environment and Conservation and to respond to requests made by the Department, operation and maintenance expenses not covered elsewhere in the District's rate structure and any other miscellaneous costs. T. at 20, 56-57.

The steps required by the Company provide sewer service to a commercial business or a developer in a previously unserved area requires far more than "completing a template form and a ten minute appearance before the TRA" as suggested by the East Sevier County Utility District (the District) in its Post-Hearing Brief. The Company must (1) meet with a developer to evaluate the sewer service needs of the developer, (2) hire a soil scientist to review any available soils maps, walk the property and perform soil tests to determine the best area for the disposal system, (3) hire an engineer to do a preliminary design and layout of the system and coordinate with the developer's engineer, (4) prepare a budget of costs for the proposed system, (5) meet with personnel at the Tennessee Department of Environment and Conservation on the site to determine the feasibility of the issuance of a permit for the proposed system, (6) meet with municipalities to determine if they are able to serve the development, (7) prepare a contract of

¹ References to the Transcript shall be designated T __ hereafter

commitment with the developer for the proposed service, (8) prepare maps of the site and the area, (9) prepare the petition to the Authority, (10) respond to any Staff information requests, (11) appear at the Authority Conference where a hearing officer is appointed, (12) attend the hearing on the petition and (13) attend the Authority Conference where the hearing officer's decision is reviewed. In the event the petition is opposed, the cost is even higher and the delay longer from the time a developer first makes its request and a sewer availability letter can actually be issued by the Company. All of these steps have a cost associated with them which must be recovered through the Company's rates for service. Some of these steps can be eliminated or shortened when a certificate is granted to a large area as requested by the Company in this case. These costs and the time delay are significant and justify the grant of a certificate for a large area when a significant demand exists for decentralized sewer systems as has been shown by the Company in this case.

The public does derive real benefits from the grant of a certificate to a larger geographic area. The City asserts that "a decentralized sewer system is self-contained and includes a treatment facility for a specific project or development." This is not always the case. In areas where the Company has received a large service area such as Stewart County and the City of Coopertown, large scale facilities that serve multiple developments have been built. When the Company's larger sewer treatment system uses a lagoon system, the monthly rate for sewer service according to the Company's tariff is \$30.98 per month rather than \$35.11 per month. The developer's per lot cost for the construction of the sewer system conveyed to the Company is also less which can be passed on by the developer to the homeowner in a lower lot price. If the Authority decides that the Company can only file petitions for a certificate on a project by project

basis, such a decision would practically preclude the Company from being able to do long term planning and to construct larger, regional facilities that serve multiple developments in a geographic area. The public would then not receive the benefit of the lower rates such larger systems can offer.

In its Post-Hearing Brief the City asserts that the grant of the Company's petitions in this consolidated case "is inconsistent with the City's urban growth plan." The Company respectfully disagrees. The City's Regional Growth Plan attached as Exhibit 1 to Mr. Jagger's Pre-Filed Direct Testimony provides, "The City has provided public sewer to ninety (90) percent of its corporate limits. The remaining areas are in the newly annexed portions. *Pigeon Forge will not provide public sewer outside of its corporate limits.* (emphasis added). Exhibit 1 at 11. The City's urban growth plan does not contemplate that the City will provide sewer service outside of its boundaries. Therefore, the grant of the Company's Petitions are not inconsistent with such plan.

More importantly, the grant of the Petitions in this case will actually enhance the City's ability to provide sewer service to future annexed areas. Upon annexation the City can tie its existing sewer system to the Company's decentralized system to collect wastewater for treatment which is significantly cheaper than hooking up individual homes with septic tanks and leach fields. When the Company has installed a large scale decentralized system for multiple developments, the cost savings to the City in delivering sewer service to newly annexed areas is even greater.

In its Post-Hearing Brief, the District asserts, "It has always been the policy of the Authority to promote competition and the orderly development of competitive markets." The

Company is not aware of any rule or decision of the Authority where it has specifically found that sewer service or other utility services other than telephone service should be a competitive service. More accurately, the Authority seeks to assure that utility customers obtain utility services at the most reasonable cost. When the Company has applied for certificates, the Authority has historically inquired about whether a municipality or other utility provider is able to provide sewer service in the area requested. This inquiry does not appear to be consistent with the promotion of utility services (other than telephone services) on a competitive basis. Nevertheless, should the Authority conclude that competition should exist in the provision of sewer services, the grant of the certificates sought in this consolidated docket is consistent with such an objective as explained in the Company's Post-Hearing Brief.²

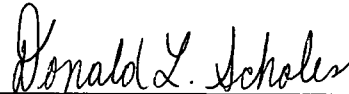
When the Authority considers a petition for a certificate, it has historically looked the managerial, financial and technical ability of the petitioner and the public need for the service requested. The hearing officer has already found that the Company has the managerial, financial and technical ability to provide sewer service within the geographic area requested in the Petitions. The Company has submitted evidence which supports the public need for the grant of the entire area sought. The grant of the certificates sought will not adversely affect the City's ability to provide sewer serve within its urban growth area will enhance it. To the extent the District needs any additional authority to provide sewer service within the area sought by the Company, it has a statutory procedure for doing so.

² The vast majority of sanitary sewer service in Tennessee is provided by nonutilities as defined in T C A § 65-4-101 over which the Authority has no jurisdiction. Therefore, the Authority's ability to introduce competition in the provision sewer service in Tennessee is very limited under current law.

Therefore, the Company has met its burden of showing that the present or future public convenience and necessity requires the grant of the Company's Petitions.

Dated this 27th day of August, 2004.

Respectfully submitted,



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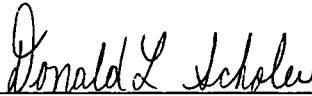
Certificate of Service

The undersigned hereby certifies that the above and foregoing Reply Brief of Tennessee Wastewater Systems, Inc. has been served upon the following persons on this 27th day of August, 2004 by U.S. Mail, postage prepaid:

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August 20, 2004

Opinion No 04-134

"Utility Water Service" under Tenn. Code Ann. § 6-51-301(a)(1)

QUESTION

Under Tenn Code Ann. § 6-51-301(a)(1), no city may render "utility water service" outside its boundaries when all of the area to be served is included within the scope of a certificate from an appropriate regulatory agency authorizing some other person, firm, or corporation to render utility water service. Does a city's provision of sewer service come within the meaning of "utility water service" under this statute in light of *Lynnwood Utility Company v. Franklin*, No. 89-360-II, 1990 WL 38358 (M.S. Tenn.Ct.App. April 6, 1990)?

OPINION

In *Lynwood*, the Court of Appeals expressly declined to hold that the term "utility water service" as used in the statute included sewer service. This case, therefore, does not provide binding legal authority for including sewer service within that term. Because Tennessee statutes generally list water and sewer service as separate services, a court is likely to conclude that the term "utility water service" as used in Tenn. Code Ann. § 6-51-301(a) does not include a sanitary sewer system. But other statutes, including Tenn. Code Ann. § 7-51-401(c) and Tenn Code Ann. § 7-82-301(a), could also prohibit a city from extending sewer service beyond its city boundaries.

ANALYSIS

This opinion concerns the definition of "utility water service" as used in the following statute

Notwithstanding any other law, public or private, to the contrary, no municipality may render utility water service to be consumed in any area outside its municipal boundaries when all of such area is included within the scope of a certificate or certificates of convenience and necessity or other similar orders of the Tennessee regulatory authority or other appropriate regulatory agency outstanding in favor of any person, firm or corporation authorized to render such utility water service

Tenn. Code Ann. § 6-51-301(a). The request refers to an unpublished opinion of the Tennessee Court of Appeals for the Middle Section, *Lynnwood Utility Company v Franklin*, No. 89-360-II, 1990 WL 38358 (M.S. Tenn.Ct.App April 6, 1990). That case actually addressed a city's obligation to pay damages suffered by a sewer company when the city annexed land within the company's service territory and decided to provide sewer service to the area. That requirement is in the third sentence of Tenn. Code Ann § 6-51-301(a)(1), which is not quoted above. The Court stated that it would "assume without holding" that the term "utility water service" in the statute included sewer service provided by the company. But the Court found that the utility company had suffered no damages under the statute because it did not provide service to the annexed area. The Court, therefore, expressly declined to hold that the term "utility water service" as used in the statute included sewer service. This case, therefore, does not provide binding legal authority for including sewer service within that term.

The term "utility water service" is not used in any other Tennessee statute. Other statutes expressly mention water and sewer service, reflecting an assumption that the two types of services are different. For example, Tenn. Code Ann § 6-51-102, also a part of the statutory annexation scheme, refers to a plan of services that must include, among others, "water service" and "sanitary sewer service." Tenn. Code Ann. § 6-51-102(b)(2) Tenn Code Ann. § 7-35-201(1) authorizes a city "also providing water services" to a property to terminate water service to a customer that refuses to connect to a city sanitary sewer system. Under Tenn. Code Ann. § 6-54-122(f), a statute on eminent domain procedure does not apply to eminent domain by a city to acquire property interests to be used to benefit a municipal utility, including "water utility services" and "sewer utility services." Based on these statutes, a court is likely to conclude that the term "utility water service" as used in Tenn. Code Ann. § 6-51-301(a) does not include a sanitary sewer system.

Depending on the facts and circumstances, other statutes would also be relevant to this issue. Under Tenn. Code Ann § 7-51-401(a), with one exception, a city is authorized to extend its sewage collection and treatment services outside its boundaries to customers desiring the service. But subsection (c) of the statute provides:

No such . . . municipality . . . shall extend its services into sections of roads or streets *already occupied by other public agencies rendering the same service*, so long as such other public agency continues to render such service.

Tenn Code Ann § 7-51-401(c) (emphasis supplied). The statute does not define the term "public agency," but it clearly includes a utility district operating under Tenn Code Ann. §§ 7-82-101, *et seq.*, and arguably includes a utility company holding a certificate of authority from the Tennessee Regulatory Authority. Under this statute, therefore, a city would be prohibited from extending sewer service to an area outside its boundaries that is already being served by a public agency. In addition, a utility district is the sole public corporation empowered to furnish authorized services in its territory, "unless and until it has been established that the public convenience and necessity requires other or additional services[]" Tenn Code Ann § 7-82-301. Under this statute, a city would be

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prohibited from extending sewer service to an area outside its boundaries and within the service area of a utility district authorized to furnish sewer services, unless it were established that the public convenience and necessity requires other or additional services. This Office has concluded that a city may petition the county executive to limit the service area of a utility district or otherwise allow the municipality to serve the area. Op. Tenn. Att'y Gen 02-110 (October 4, 2002).

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Requested by

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